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Tribunal rules on FOI access to text messages

Thomas; Secretary, Department of Defence and (Freedom of Information) [2018] AATA 604 is a significant Administrative Appeals Tribunal decision under the *Freedom of Information Act 1982* (FOI Act) for 2 reasons. The first is that it deals with a request for access to text messages, which is an emerging and relatively novel issue under FOI. Secondly, it gives considered guidance on the deliberative processes conditional exemption.

Factual background

In the months leading up to April 2016, *The Australian* newspaper had published a number of articles and editorials which expressed some criticism of the Australian Defence Force's (ADF) cultural inclusion and diversity policies. The Chief of the Defence Force (CDF), Vice-Chief of the Defence Force (VCDF) and heads of each service jointly signed a letter to the editor, and submitted it to *The Australian*. The letter was published in both the online and print editions of *The Australian* on 13 April 2016, but the published versions differed from the letter as submitted, with some words substituted, and other text deleted entirely.

In the early morning of 13 April, CDF and VCDF exchanged 17 text messages, discussing whether and how Defence should respond to publication of that amended version.

Hedley Thomas, a journalist at *The Australian*, submitted an FOI request for documents regarding the Defence Chiefs' letter to the editor. Defence identified the text messages as relevant to the request but decided that they were exempt from disclosure by virtue of s 47C of the FOI Act. That section exempts 'deliberative matter' where its disclosure is contrary to the public interest.

Issue for consideration by the Tribunal

Before the Tribunal, it was common ground that the text messages comprised 'deliberative matter'. The issue to be determined was whether release of the text messages would be contrary to the public interest.

Tribunal decision

The Tribunal accepted Defence's evidence that there was a need for CDF and VCDF to communicate freely, candidly and spontaneously in circumstances of urgency as each would see it, and held that the utility of text messages as a medium for this type of communication was manifest: [134], [139]. The Tribunal considered a claim of inhibition of 'frankness and candour' as a factor against disclosure carries little, if any weight in the abstract. Rather, the weight to be afforded this factor is context-specific, requiring analysis of the specific documents in issue, their context, and the circumstances which pertain at the time when the decision falls to be made: [71].

The Tribunal noted that the 'high seniority' of the author of a document is an irrelevant consideration (see s 11B(4) FOI Act), but confirmed this does not mean that the functions being discharged by an author, given that author's high seniority, were rendered irrelevant. The Tribunal specifically found that the functional context of the communication and present circumstances relating to the discharge of like functions remained highly relevant: [132].

In considering the documents in issue, the Tribunal stated they were struck by not just their immediacy, but their complete spontaneity and openness. While the exchange was not private in the personal sense, it was private in the sense that CDF and VCDF were writing for no other audience than each other. The Tribunal found it was relevant that the exchange was occurring against the background of a mutually assumed state of knowledge about the policies and related matters, and that media relations and provision of public information is a function of higher command: [112], [96].

The Tribunal also confirmed that it was not dealing with a 'class claim' in this case, in the sense of s 47C always operating to exempt text messages from access, and that the 'focus must be on the particular text messages, not on a class': [109].

Significance of decision

There was no dispute that text messages can be documents subject to the FOI Act, so the Tribunal decision does not address this in any detail. What it does provide is helpful guidance on some relevant considerations when dealing with text messages containing deliberative matter. Two key takeaways from the decision are:

- Text messages, as a class, do not attract special or different treatment merely because they are text messages.
- Where the context for the exchange is a need for urgency or immediacy, or where the content reveals an assumed background understanding or an expectation of privacy (ie confidentiality) in the communication, these factors may weigh in favour of an exemption claim. While these considerations are not unique to text messages, the use of text messages as a preferred medium may in an appropriate circumstance point towards a likelihood that one or more of these considerations is present.

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